

every adult in the United States potentially benefits from the availability of these services through home and business phones, and at pay phones.

**B. Any Charges Assessed Directly To Toll Carriers  
Must Be Spread Across All Business Users As part  
Of The Carrier Common Line Charge**

[NPRM ¶¶ 15-23] The NPRM discusses various alternatives for billing the interexchange carrier who handled payphone traffic,<sup>13</sup> none of which Intellicall submits are just and reasonable in the context of prepaid cards, or in the context of other services which use the pay phone, if the charges are subsequently passed through directly or indirectly to the 800 subscriber. Rather, the costs of the pay phones should be passed through in some manner to all potential business users as all such businesses benefit from the opportunity of customers, and potential customers, to place toll-free calls from pay phones.<sup>14</sup>

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<sup>13</sup> In many circumstances, there is no simple answer to the question of which carrier "carried" the call. As with Intellicall's prepaid operations, two carriers may be involved in every completed call from the calling party to the called end user.

<sup>14</sup> The Commission has recognized a distinction between residential and business users for purposes of determining applicable subscriber line charges. See generally, Common Carriers, Service, Resale and Shared Use Wide Area Telephone Service, 93 FCC 2d 241, 292 (1983).

The Commission could effect this result by requiring that an additional amount be directly added to the subscriber line charge presently assessed to all business users. By spreading the costs of the pay phones over the universe of businesses who benefit from 800 services, the resulting increase in SLC contributions would be minimal.<sup>15</sup>

While the cost causation recovery principles are not satisfied as directly as requiring the calling party to place coins in the box, this method nonetheless is consistent with the principles of cost causation to the same degree that the access regime and subscriber line surcharges are today.<sup>16</sup>

**C. The Cost Of Payphone Compensation Should Not Be Assessed Directly On The 800 Subscriber**

[NPRM ¶¶ 15-23] Another important consideration in adopting a plan that spreads the costs of payphone compensation among all IXC business users is that it is clear that assessing the costs directly on the 800 subscriber would have a very significant adverse impact. As explained above, prepaid providers who subscribe to 1-800 as an access means would have no opportunity

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<sup>15</sup> Increasing the SLC is a matter currently under consideration in several states.

<sup>16</sup> See Common Carrier, Service, Resale and Shared Use, Wide Area Telephone Service, Third Report & Order, 93 FCC 2d 241, 278 (1983).

to pass the costs on to the cost causer, the calling party. Neither Intellicall nor other providers of similar services have any way of knowing the degree to which callers using their prepaid card use pay phones, but given the razor thin margins of the prepaid business, any further uncompensable costs would have a potentially very detrimental impact.

Furthermore, any compensation mechanism that imposes the fee for the use of the payphone directly upon 1-800 subscribers would interfere with millions of existing contracts between these subscribers and the carrier providing the 1-800 service. A subscriber would be forced to pay more than what they contracted for. This, in turn, may cause greater dissatisfaction among subscribers utilizing these services and lessen the value of such services to those subscribers. This is particularly egregious because, as discussed above, the subscriber to 1-800 services has no control over the location from where the calls are placed. In addition, there is no mechanism by which they can block calls originating from payphones.

It is also clear that charging governmental, public interest, and other 800 subscribers would have an unanticipated financial impact on those subscribers. Clearly, some amount of calls placed, e.g., to the Department of Immigration for Legalization information are placed from pay phones. That one agency's bill could be startling if the payphone charges are

passed through to the called party.<sup>17</sup> Further, the impact on a public interest organization (such as an AIDs hotline or a battered womens crisis hotline), could be devastating if such an organization were required to pay for all the calls placed to them from public payphones. It might even force such organizations to terminate their 800 service, a result clearly not in the public interest.

**V. ALTERNATIVELY, THE COMMISSION SHOULD ADOPT  
A SET-USE FEE PAID FOR BY THE CALLING PARTY**

**A. A Coin Paid Set-Use Fee Is The Only Proposed  
Compensation Methodology That Imposes The Payment  
Obligation Directly On The Cost-Causing Party**

[NPRM ¶¶ 15-23] As an alternative method of allowing payphone providers compensation under Section 276, the Commission should articulate a national policy which allows payphone providers to charge the calling party for use of their payphones on a coin sent paid basis. As Intellicall sees it, a payphone provider would select a rate (or the FCC would impose a cap under which the payphone provider's rate would not be deemed unreasonable),<sup>18</sup>

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<sup>17</sup> Of course, the impact is all the more unreasonable under Section 201(b) of the Act because the called party has not volunteered, offered, or in any way indicated a willingness to pay such charges, and in Intellicall's specific case, is not willing and cannot afford to do so.

<sup>18</sup> If the FCC chose, it could fashion a plan which permitted payphone providers the ability to charge more if states expressly approved such amounts in excess of the national policy amounts.

and the payphone provider would charge that rate for each completed call.<sup>19</sup>

Intellicall believes a coin paid set-use fee to be the most appropriate means of giving payphone providers the opportunity to derive compensation from calls placed by the general public from their payphones. Indeed, in Intellicall's view, it is the only method which directly appropriately places the payment obligation upon the person who chose to incur the costs. The Commission has previously found that charging the end users who originate calls from pay telephones is, in fact, "the ideal" solution to payphone cost recovery.<sup>20</sup>

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<sup>19</sup> Intellicall would not recommend that payphone providers be permitted to charge for 0-calls at this time. As a presubscribed carrier offering operator and emergency call handling services, Intellicall Operator Services is aware that many consumers continue to place emergency calls by dialing -0, even where 911 is available. Payphone providers who want compensation from compensable 0- traffic -- i.e., non-emergency calls -- would need to contract with their OSP to inform the caller to hang up and redial on a 0+ basis.

<sup>20</sup> *In MTS/WATS Market Structure*, 97 FCC 2d 682, 705 (1983). Although the Commission did not adopt such an approach, concluding that "we are convinced, however, at this time this ideal cannot be achieved," the Commission offered no rationale for its conclusion. Certainly there is no apparent rationale for achieving this ideal today, even recognizing the imperfections in using this methodology.

**B. A Coin-Based Set-Use Fee Approach Is Consistent With  
The Commission's Long-Standing Policy Of Cost-Causation**

[NPRM ¶¶ 15-23] Intellicall submits that it is incumbent upon the Commission to choose a compensation mechanism that appropriately apportions the underlying costs among the cost causers. Indeed, the Commission has historically adopted a cost-causative approach in cost-allocation proceedings. In the payphone context, it is the user of the payphone who causes the costs to be incurred. In the debit card context, for example, it is the caller who makes the choice of e.g., home phone, business, hotel or pay phone from which to place a debit card call. Similarly, it is the calling party who makes the choice as to the location from which the call will be placed. Neither the service provider nor the subscriber<sup>21</sup> has control over that decision. It therefore makes sense that it is the party placing the call who should pay for the convenience associated with the ability to place a call from a desired location.

Indeed, the concept that the person utilizing a service should pay for that use is not novel, but rather holds true in

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<sup>21</sup> In the prepaid context, using Intellicall's service as an example, Intellicall would be the prepaid service provider, and the subscriber to the 800 number; one or more facilities based carriers would provide the underlying transmission service to Intellicall for resale. As does Intellicall, many resellers may use one carrier for calls placed to the platform, and another carrier for calls placed from the platform to the end user.

almost all other situations, including most situations involving an aggregator of telecommunications services. For example, the guest in a hotel pays the hotel a surcharge for any calls placed from that room, including access-code and toll-free calls. In another context, the person purchasing facsimile services pays not only for the costs of transmission over telecommunications lines, but pays the facsimile owner a fee for use of the equipment. Thus, it is clear that an appropriate payphone compensation mechanism, and one the Commission should adopt, requires that the person using the service, and causing the costs, compensate the payphone owner accordingly.

Adoption of a mechanism based on payment by anyone other than the caller results in a situation in which carrier or subscriber is forced to pay for the origination of a call over which they have no control. Such a mechanism does not allow the called party to refuse the call. This is in contrast to the common and accepted practice, in all other transient contexts, that allows a person to inquire into the rate being charged for the call and the ability to accept or reject that call.<sup>22</sup> Furthermore, such a mechanism forces the carrier or subscriber to

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<sup>22</sup> For example, persons receiving a collect call are given the opportunity to accept or reject a call.

pay for equipment that it has not chosen to utilize. This practice would be an unreasonable practice under Section 201(b).

An additional benefit that would result from the Commission's adoption of a mechanism that requires the calling party to pay the fee, is that this type of compensation mechanism furthers competition for payphone services. Assuming that the payphone provider can select a rate, or can choose from a range of rates under an FCC imposed cap, there is incentive to price such fees competitively because the person with the ability to choose the lowest-cost service -- i.e., the calling party -- is the person paying the fee. In other words, if the carrier or the 800 service subscriber paid the compensation fee, the calling party would have no incentive to price shop since he is not paying for the use of the phone. In this manner, the setting and charging of fees by the payphone owner to the calling party for use of its phone (as compared to a "carrier-pays" mechanism) is the most competitively efficient mechanism for payphone compensation.

**C. A Coin-Based Set-Use Fee will Help Deter Fraud**

[NPRM ¶¶ 15-23] If the Commission determines that it is the provider or subscriber, rather than the user, who pays per-call compensation to the payphone provider, there is nothing to prevent the payphone provider from engaging in fraudulent activities. For example, unscrupulous payphone providers could



attach an auto dialer<sup>23</sup> to their payphones in order to place multiple 1-800 calls for the purpose of increasing their revenues.<sup>24</sup> This practice could result in significant loss to toll providers or 1-800 subscribers and would unjustly enrich unscrupulous providers. In the past, the Commission has adopted mechanisms in its regulations that meet both the goals of the regulations as well as the goal of eliminating incentives to commit fraud.<sup>25</sup> A coin-based set-use fee approach fully satisfies both of these objectives in the context of payphone compensation.

**D. A Coin-Based Set-Use Fee Is The Least  
Administratively Burdensome Mechanism**

[NPRM ¶¶ 15-23] The administrative burden resulting from any compensation method other than requiring payphone users to pay a

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<sup>23</sup> An auto dialer is equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number-generator and to dial such numbers.  
47 U.S.C. § 164.1200(f)(1).

<sup>24</sup> The Commission (NPRM at ¶ 23) seeks comment on what rules, if any, it should adopt to prevent autodialer and other types of fraud. Intellicall can think of no rule *per se*, which would prevent the use of autodialers if the compensation methodology encourages it as does some forms of per call compensation. One way to minimize, but not eliminate the fraud, would be to only provide compensation for calls that exceed one minute in length. In these circumstances, use of autodialers would be deterred although not prevented.

<sup>25</sup> See, e.g., Proposed Rules, 47 C.F.R. Part 76, Cable TV Act of 1992 Part VI 58 F.R. 46737, 46739 (1993).

"set use fee" with a coin deposit is significant. Indeed the underpinning for implementation of any such compensation scheme is the ability of IXCs to track compensable (completed) calls; that is to determine which of the universe of such calls actually originate from whose payphones and are completed.

Since the originating telephone number is part of the call detail record, it would seem a simple matter to merely scan the universe of originating telephones and compare them with a comprehensive list of all known payphone telephone numbers.

As will become evident, the reality of the process is far more complex than the simple procedure outline above. In fact (and notwithstanding the overwhelming financial burden and business disruption that would be caused by imposing the compensation payment obligation on prepaid service providers), it is so complex that requiring each prepaid service provider to expend the necessary funds to develop and implement appropriate procedures would lead most such providers to either ignore the requirement altogether, or cease operations altogether, thereby depriving a growing segment of the population of a creative, valuable and useful service. The Act surely did not contemplate such draconian and anticompetitive results.

First, assuming the IXC only provides the underlying "800" service, it has no way to determine if any prepaid call originating on its network is actually completed to the called

number. As previously described, each prepaid call actually consist of two calls and the orginating carrier only knows whether the originating call was completed to a prepaid platform. Whether the originating and terminating carries are one in the same or not, the IXC has no way to associate a particular originating call with a completed terminating call.

Assuming further that completion of the originating call to a provider's platform is considered a completed and, therefore, a compensable call, the next hurdle is the availability of a comprehensive and accurate list of phone providers PSP telephone numbers with ownership known at the time each compensable call was placed. LECs currently are required to furnish IXCs quarterly lists of payphone line numbers and presumably could add their own from which IXCs could develop (or have developed), the requisite payphone master database. However, as has already been demonstrated, LEC data is not always current and subscribership of payphone lines is subject to "churn," making it difficult to know with specificity which payphone provider actually was due compensation at the time each particular call was placed. Under the proposed rules, each IXC would be subject to annual verfication of its tracking and paynent procedures to assure that all obligations are being met.

This leads to the requirment that each IXC have a disputed ANI resolution policy in place from which it can negotiate with

LECs and PSPs to resolve disputes for up to 18 months after the close of a compensation period.

It should be obvious from the foregoing that only large facilities based carriers have the resources to develop and implement the complex tracking and payment procedures that will be required for any compensation plan ordered by the Commission other than a set use fee paid by the payphone user by coin deposit.

**E. A Coin-Based Set-Use Fee Mechanism  
Is Consistent With The Act**

**1. The Commission May Permit The Collection Of A  
Coin-Based Set-Use Fee By The Payphone Provider**

[NPRM ¶¶ 15-23] Section 226(e)(2) directs the Commission to

consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones.<sup>26</sup>

The statute does not obligate the Commission to prohibit the collection of advance payment by payphone owners. Indeed, the Commission has concluded that payphone owners can

charge callers a flat fee for all access code calls that would be similar to the charge for local calls, provided that

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<sup>26</sup> 47 U.S.C. § 226 e)(2).

the same charge applied to presubscribed calls and was otherwise consistent with federal and state law.<sup>27</sup>

Thus, while the Commission may not prescribe payphone compensation in the form of an advance payment, nothing in the Act prohibits payphone owners from requiring consumers to deposit payment (e.g., 25 cents) prior to making an access-code or 800-subscriber call.<sup>28</sup>

**2. A Rate Cap Set By the Commission On Set-Use Fees Is Not A Rate Prescription**

[NPRM ¶¶ 15-23] If the Commission determines, pursuant to the requirements of the 1996 Act, to adopt a coin-based set-use fee as a compensation mechanism, it may establish a range of rates (i.e., a rate cap) or rate guidelines within which compensation assessed by payphone providers must generally fall. The adoption of a rate cap or guidelines is consistent with the Communications Act and does not violate the provision contained in Section 226(e)(2) that prohibits the Commission from prescribing advance payment. The Commission has found that the establishment of a

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<sup>27</sup> In the Matter of Policies and Rules Concerning Operator Services Access and Pay Telephone Compensation, Notice of Proposed Rulemaking, CC Docket No. 91-35, 6 FCC Rcd 1448, 1450 (1991).

<sup>28</sup> The fee could be competitively priced determined by the payphone owner, set by the payphone owner under a cap established by the Commission, or set (at a fixed rate or within a range of rates) determined by state authorities.

rate cap does not constitute a "prescription" within the meaning of Section 205 of the Communications Act.<sup>29</sup> Since payphone providers would determine their own fee for payphone compensation or choose a rate that falls under a cap set by the Commission, Section 226(e)(2) is not contravened or otherwise violated.

**VI. UNDER ANY COMPENSATION MECHANISM, THE COMMISSION SHOULD EXEMPT ALL CALLS LASTING LESS THAN ONE MINUTE**

[NPRM 91-15-23] While the 1996 Act does not set forth any exceptions to the per-call compensation requirement, other than those for emergency and relay services, the Commission has authority to create exclusions from a statutory requirement where (i) it is necessary to enable it to carry out the statutory mandate or (ii) a literal carrying out of the statutory provisions would have futile results or a trivial gain. The first circumstance is based on administrative need, the second on de minimus circumstances. Both circumstances have been

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<sup>29</sup> See, e.g., In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 3 FCC Rcd 3195, 1988 FCC LEXIS 1110 (1988) (holding that establishment of a general suspension zone for above-cap and above-band filings does not "proclaim that a certain situation . . . is unlawful and shall not occur," and therefore does not constitute a prescription). See also *Nader v. F.C.C.*, 520 F.2d 182, 199 (whether agency has prescribed depends upon impact of action rather than form); *Direct Marketing Ass'n v. F.C.C.*, 772 F.2d 966, 971 (D.C. Cir. 1985) ("In practice, an agency statement has not been found to be a prescription absent explicit language that nonconforming tariffs will be rejected, combined with an agency motive to avoid public scrutiny and perhaps even judicial review.").

recognized as providing an agency with implied authority to create exclusions to a statute where the statute does not expressly provide for such authority.<sup>30</sup> Both of these circumstances are present here and justify the creation of an exclusion exempting calls lasting less than one minute.

Exempting calls that are less than one minute has a number of practical as well as public policy benefits. First, imposition of a one-minute rule will greatly reduce the potential for fraud through the use of auto dialers, since such calls will necessarily last less than one minute.

Second, it will ensure that, pursuant to the statutory mandate, payphone providers are compensated only for completed calls. As a general proposition, uncompleted calls should not be compensable. It would not be equitable to require providers to compensate payphone owners for calls that generated no revenue for the providers.<sup>31</sup> Completed calls typically last more than

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<sup>30</sup> See Rules and Regulations, Department of Transportation, National Highway Traffic Admin., Motor Vehicle Content Labeling, 59 FR 37294, 37320 (1994) (agency has implied authority to create exclusions based on administrative need, related to its inability to carry out a mandate fully, or de minimus circumstances, where following the plain meaning of statute would lead to absurd or futile results or to a gain of trivial or no value).

<sup>31</sup> See, e.g., Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Report and Order and Further Notice of Proposed Rulemaking, Continued on following page

one minute. As explained above, debit card and other calling card calls that reach the card provider's platform but do not reach the intended recipient (e.g., the account number is invalid or the amount remaining is insufficient to cover the call), will nevertheless be a "completed call" unless the one-minute rule is imposed.<sup>32</sup> However, calls that terminate at the card provider's platform, and do not reach the intended recipient, are not completed calls (as that term has traditionally been defined by the Commission) and should not be compensable.<sup>33</sup>

Finally, the one-minute rule would exclude incidental calls (i) which constitute an insignificant portion of the payphone

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6 FCC Rcd 4736, 4746 (1991) (concluding that only completed calls should be compensable).

<sup>32</sup> This result would be inconsistent with prior Commission decisions concluding that an 800 call is a single call for all practical purposes. See *Florida Public Telecommunications Ass'n v. F.C.C.*, 54 F.3d 857, 860 (D.C. Cir. 1995) (concluding that to the caller, an 800 call appears to be a single call, regardless of whether the caller must dial a second number at some point before the call is completed). See also *Teleconnect Co. v. Bell Tel. Co.*, 10 FCC Rcd 1626, 1995 WL 59773 (1995) (noting that the end-to-end nature of the communications is more significant than the facilities used to complete such communications, and that interstate communication does not end at an intermediate switch).

<sup>33</sup> In this regard, failure to adopt an exclusion for calls lasting less than one minute would result in the inability of the Commission to carry out fully the statutory mandate, one of the circumstances justifying creation of such an exclusion.



provider's total revenues, and (ii) for which public policy reasons justify an exemption. In the debit card or calling card context, calls that terminate at the card provider's platform but do not reach the intended recipient, are an example of such incidental calls. They represent a minor segment of the total calls made from payphones. In addition, as discussed in the preceding paragraph, compensation for such calls is not justified because they are not "completed" calls within the meaning of the statute.<sup>34</sup> These are the type of de minimus circumstances justifying the creation by the Commission of an exemption for calls lasting less than one minute.

**VII. THE COMMISSION SHOULD CHOOSE A COIN-BASED SET-USE FEE APPROACH AS AN INTERIM COMPENSATION MECHANISM**

[NPRM ¶¶ 15-23] The Commission asks whether it should provide payphone providers some measure of interim compensation, to be paid until the effective date of the final rules it ultimately adopts. The Commission need not establish an interim compensation mechanism. It need only adopt the coin-based set-use fee proposed in these comments. This approach can be implemented quickly and at relatively little cost. In addition, it is relatively easy to administer once it is in place. These

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<sup>34</sup> Another example of what might be considered incidental calls are those calls made to paging carriers to reach their subscribers. Calls made to a subscriber's pager are typically fifteen seconds in duration. This is in contrast to voice calls which typically last 3.5 minutes.

same considerations guided the Commission in implementing the current per-phone compensation mechanism more than four years ago.

The rate clearly should be no greater than what the payphone provider itself pays for a local call, and even that amount is egregiously excessive. In the local call context, the payphone provider incurs the message or measured line charge associated with the local call; in the 800 context, for example, a payphone provider may pay \$.06-\$.10 or more for a local call for the subscriber line. It pays no such rate in the context of the toll call. It pays nothing to the local carrier for 0+, 0-, 10XXX- or 800-access or 800 subscriber numbers. Thus, allowing a rate of more than the local call rate minus the local call charge to the payphone provider would result in toll callers being required to pay more for the same facility than local.

#### **VIII. CONCLUSION**

For the foregoing reasons, the Commission should adopt one of the payphone compensation mechanisms proposed herein.

THE INTELICALL COMPANIES  
CC Docket No. 96-128 - Comments  
July 1, 1996

Respectfully Submitted,

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July 1, 1996